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Court of Appeal Rules That Offer To Compromise Is Valid
And Will Support Court's Award of Post-Offer Fees and Costs
Even Though It Only Addresses One Of Two Operative
Pleadings Before the Court And Acceptance Of The Offer Would
Have Violated The One Final Judgment Rule

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Continuing a trend of liberally construing California's "Offer to Compromise" statute, Code of Civil Procedure section 998, in WestamericaBank v. MBG Industries (2007) DJDAR 18699 ("WestamericaBank case"), the Court of Appeal, Fifth Appellate District ruled that a trial court properly found a defendant's and cross-complainant's offer to compromise as valid even though the offer to compromise only addressed allegations in the plaintiff's complaint and did not resolve the defendant's and cross-complaint's pending cross-complaint.

Code of Civil Procedure section 998 has been a part of California law since 1851 and, while it has undergone some modifications over the years, its substance has remained essentially unchanged. See, Taing v. Johnson Scaffolding Company (1992) 9 Cal.App.4th 579. Code of Civil Procedure section 998 provides that any party to an action may:

"serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time."

The offer is deemed withdrawn if it is not accepted before trial or 30 days after the offer has been made. Code of Civil Procedure section 998 (b)(2). If the defendant's offer is not accepted and the plaintiff fails to obtain a more "favorable judgment", the plaintiff cannot recover its post-offer costs and must pay the defendant's costs from the time of the offer, which can include expert witness fees. Code of Civil Procedure section 998 (c)(1), see also, Scott Co. of California v. Blount, Inc. (1999) 20 Cal.4th 1103 and Barella v. Exchange Bank (2000) 84 Cal.App.4th 793.

An issue that has remained unresolved over the years is whether an offer to compromise one of two competing pleadings before the court (i.e. an offer to settle a complaint but not a competing cross-complaint) is valid. That particular question appears to have been resolved by the WestamericaBank case.

In the WestamericaBank case, a lender, Valliwide Bank, extended a line of credit to Michael W. Ross doing business as Pacific Control Company in 1997. Thereafter, WestamericaBank became Valliwide Bank's successor. In July 2003, Mr. Ross, doing business as Pacific Control Company, executed a Change in Terms Agreement with WestamericaBank which identified the amount of the loan as \$300,000.00 due either on demand or on June 30, 2004. The Change in Terms Agreement contained an attorney's fees clause. In September 2003, Mr. Ross formed MBG Industries, Inc. ("MBG"), in which he was the sole shareholder, and sold Pacific Control Company to MBG. Michelle Ross, Mr. Ross' spouse, was apparently an employee of MBG.

In June 2004, shortly before the \$300,000.00 loan was due to WestamericaBank, Mr. Ross died. Ms. Ross inherited and succeeded to Mr. Ross' property, including 100% of his shares in MBG. Ms. Ross attempted to negotiate an extension of the line of credit and filed a written application with the bank for credit. Thereafter, WestamericaBank advised Ms. Ross that it would not renew the note and then filed suit in Fresno County Superior Court to recover on the defaulted note. In response to the suit, MBG and Ms. Ross filed a cross-complaint alleging that the lender had denied credit because of Ms. Ross' gender.

In January 2005, MBG and Ms. Ross presented WestamericaBank with a check for the full amount which was prayed for in the lender's complaint. Thereafter, WestamericaBank advised MBG and Ms. Ross that \$25,162.54 was still due on the note, including \$14,340.00 in attorney's fees and costs. MBG and Ms. Ross then served an offer to compromise in the amount of \$11,001.00 plus reasonable attorney's fees and costs incurred by WestamericaBank to date, "if recoverable, to be determined by the Court". The offer was not accepted.

The trial court granted WestamericaBank's Motion for Judgment on the Pleadings on one cause of action in the cross-complaint and later granted a Motion for Summary Judgment on the remaining causes of action. In January 2006, the parties entered into a Stipulation for Entry of Judgment. The parties stipulated the judgment would be entered in favor of WestamericaBank for \$11,614.66 as of November 29, 2005, plus daily interest thereafter. The stipulated judgment also provided that the trial court would determine the identity of the prevailing party.

MBG and Ms. Ross took the position that the stipulated judgment, given its amount and because attorney's fees were to be determined following the trial court's determination of the identity of the prevailing party, was less favorable than the terms of the offer to compromise which had previously been served. They sought significant attorney's fees on that basis.

After the parties briefed the matter, the trial court found that the offer to compromise by MBG and Ms. Ross was valid even though it only addressed the WestamericaBank complaint and did not resolve the action in its entirety. The trial court also determined that WestamericaBank failed to obtain a more favorable judgment in

comparison to the prior offer to compromise. After WestamericaBank's Motion for New Trial was denied, an appeal was timely taken.

On appeal, the Court of Appeal, Fifth Appellate District, first noted that its ruling dealt with whether the offer to compromise by MBG and Ms. Ross was valid in spite of the fact that it only addressed the allegations in one of two operative pleadings before the trial court. The Court of Appeal commented that the parties were not challenging the trial court's finding that WestamericaBank obtained a less favorable judgment than offered previously by MBG and Ms. Ross.

In its holding, the Court of Appeal acknowledged that "the one final judgment" rule provides that an appeal may be taken only from a final judgment, and not typically an interlocutory judgment. See, Code of Civil Procedure section 904.1(a)(1), see also, Morehart v. County of Santa Barbara (1994) 7 Cal.4th 725. The Court of Appeal went on to note that a judgment which resolves a complaint but does not resolve a cross-complaint pending between the same parties is not final and is not appealable even if the complaint has been fully adjudicated. See, Angell v. Superior Court (1999) 73 Cal.App.4th 691.

However, the Court of Appeal found that WestamericaBank's attempt to apply the one final judgment rule to Code of Civil Procedure section 998 was unavailing given the "distinctively different purposes" behind the statutory schemes of the one final judgment rule and the offer to compromise statute. In that regard, the Court of Appeal noted that the theory behind the one final judgment rule is to avoid piecemeal disposition and multiple appeals in a single action, see, Griset v. Fair Political Practices Commission (2001) 25 Cal.4th 688, while the purpose of the offer to compromise statute is to encourage settlement of litigation without trial. See, Elite Show Services, Inc. v. Staff Pro, Inc. (2004) 119 Cal.App.4th 263. In addition, the Court of Appeal gave emphasis to the language in the offer to compromise statute which provides that "any party may serve an offer in writing upon any other party to the action to allow judgment to be taken" and construed that language to mean that a complaint and a cross-complaint can be treated as independent actions, for purposes of the offer to compromise statute, so that a judgment on one "action" could be independent from the other "action" in the same litigation.

Based upon that analysis, the Court of Appeal ruled that, while acceptance of the offer to compromise by MBG and Ms. Ross would not have resulted in a "final judgment" for purposes of the one final judgment statute and the accepted offer would not have been appealable, the offer was valid for purposes of the offer to compromise statute based on the legislature's intent to encourage settlement of litigation without trial.

The WestamericaBank case decision is important for two reasons.

First, the facts of that case highlight the importance of the terms of stipulated judgments which follow offers to compromise. Second, and very importantly, that case demonstrates the willingness of the Courts of Appeal to broadly construe California's offer to compromise statute in favor of finding the existence of valid offers to compromise.

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